



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(Coram: Odunga, J)

PETITION NO. 6 OF 2017

IN THE MATTER OF ARTICLES 19, 20, 22, 23, 47,

53, & 159 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF CONTRAVENTION OF RIGHT TO A

NAME – SUBJECT MWM FORMERLY KNOWN AS MWM

BETWEEN

RKM (Suing as the Guardian and next friend to

MWM FORMERLY KNOWN AS MWM).....1ST PETITIONER

VERSUS

THE HON. THE ATTORNEY GENERAL.....2ND RESPONDENT

THE KENYA NATIONAL EXAMINATIONS COUNCIL.....3RD RESPONDENT

JUDGEMENT

Parties

1. The petitioner herein, **RKM**, is an adult female of sound mind residing and working for gain at Athi-River and brings this petition as the guardian and next friend to **MWM** (herein after called the minor).

2. The 1st Respondent, **the Attorney General**, is the Principal Legal Advisor to the Government of the Republic of Kenya and is mandated by law to represent the government institution in civil proceedings. The 2nd Respondent, **the Kenya National Examinations Council**, is a body corporate with perpetual succession and a common seal established under the **Kenya National Examinations Act** No. 29 of 2012.

The Petition

3. According to the petitioner, the minor herein sat for her Kenya Certificate of Primary Education in the month of November 2011 under the names **MWM**. She was subsequently, issued with a certificate No. [...] by the 2nd Respondent in the names **MWM**. However, vide a Deed Poll dated 16th October, 2015, she changed her names from **MWM** to **MWM**.

4. It was pleaded that through her advocates on record wrote various correspondences to the 2nd Respondent requesting rectification of its records and more specifically the minor's Kenya Certificate of Primary Education Certificate No. [...] but the 2nd Respondent has completely declined to act without giving any reasons and without according the Petitioner or the minor a chance to be heard. The petitioner therefore contended that the minor's legitimate expectations have not been met by the Respondent.

5. It was the petitioner's case that the minor is entitled to protection and exercise of the following fundamental constitutional rights:

a) The 2nd Respondent has violated the minor constitutional right guaranteed by Article 53 of the Constitution of Kenya, 2010 in so far as it has refused, neglected and/or ignored the minor's application to change the names appearing in her Kenya Certificate of Primary Education Certificate No. [...] from **MWM** to **MWM**.

b) The court ought to declare that the 2nd Respondent is obligated to change the names appearing in her Kenya Certificate of Primary Education certificate from **MWM** to **MWM**.

6. The foregoing facts were reiterated in the affidavit filed in support of the petition.

7. On behalf of the petitioner, it was submitted that a child's right to a name as provided for under Article 53(1) of the Constitution of Kenya 2010 includes the right of a child to change a name and the minor herein exercised her right through the Petitioner to change her name and completely renounced the use of her former name **MWM** by registering a Deed Poll for Change of name in 2015 at the Registry of Documents where she henceforth assumed usage of the name **MWM**.

8. The petitioner relied on section 10 of the **Kenya National Examination Act**, which, *inter alia* provides that the Council has the mandate of doing anything incidental or conducive to the performance of any of the preceding functions and submitted that the minor having willingly and followed the legal channel as provided by law to change her name, a legitimate expectation that she will be referred to the said new name which should include her academic certificates.

9. It was therefore submitted that the 2nd Respondent's failure to amend the Certificate to reflect the current name of the minor is in breach of her right to dignity since she identifies herself with the new name. In this regard the petitioner relied on **Republic vs. Kenya National Examination Council & Another ex-parte Audrey Mbugua Ithibu (2014) eKLR**.

10. It was therefore submitted that the 2nd Respondent's failure to amend the Certificate to reflect the current name of the minor is in breach of her right to dignity since she identifies herself with the new name. Since the minor **MWM** was a form four student at [Particulars Withheld] High School and had gone ahead to register for the Form Four exams with the name she has assumed, it was contended that it is only in the interest of justice and fairness that the name on her Kenya National Certificate of Primary Education is changed to be in tandem with the new name which shall appear on her Kenya Certificate of Secondary Education.

11. According to the Petitioner, though the Act does not expressly provide for replacement of certificates where a person has changed his or her name, a broad and purposive interpretation of Section 10 in line with the principles espoused under Article 10, article 53(1) (2) and article 259 of the Constitution, the 2nd Respondent has an obligation to change a person's name where a legal process has been followed. In this regard reference was made to Rule 9(3) of the **Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules, 2009**.

12. It was submitted that the minor's plea to change the name on her Kenya Certificate of Primary Education is not meant to perpetuate forgery other than her desire to have uniformity in her academic certificates and since the Respondents have not demonstrated how the minor's request to change her name from **MWM** to **MWM**.

13. The petitioner reiterated that the 2nd Respondent has a mandate to change the minor's certificate subject to a reasonable fee, if any required to effect the change and failure and or refusal to do so is an upfront to Article 10, 28, 53(1),(2) and Article 259 of the Constitution of Kenya 2010. In support of this position the petitioner relied Article 259.

14. Based on **Ndyanabo vs. Attorney General [2001] E. A 495** it was submitted that a plain reading of the Rule 20 as provided in the 2nd Respondent's Replying Affidavit is unfair and would occasion an injustice and breach of the minor's rights as espoused under Article 53(1) and (2) of the Constitution of Kenya 2010. In support of the petition the petitioner relied on in **Re Interim Independent Election Commission**, Constitutional Application 2 of 2011 [2011] eKLR, and **Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another** Nairobi High Court Misc. Appl. No. 890 of and contended that the 2nd Respondent has a mandate to change the minor's certificate subject to a reasonable fee, if any required to effect the change and failure and or refusal to do so is an upfront to Article 10, 28, 53(1),(2) and Article 259 of the Constitution of Kenya 2010.

15. The petitioner therefore prayed for the following orders:

A. A declaration that the minor is entitled to a name of her choice and that the 2nd Respondent is obligated to effect the changes in

the names appearing in the minor's Kenya Certificate of Primary Education Certificate No. [...] from **MWM** to **MWM**.

B. An order do issue to bring to the Honourable Court for the purposes of being quashed and to forthwith quash, the minor's Kenya Certificate of Primary Education certificate No. [...].

C. An order do issue to compel the 2nd Respondent to re-issue the minor herein with a Kenya Certificate of Primary Education certificate bearing the names **MWM**.

D. An award of compensation and/or exemplary damage as against the 2nd Respondent for violating the minor's fundamental rights.

E. Any other or further order that this Honourable Court may deem fit in the circumstances to grant.

F. Costs of this petition.

The Respondents' Case

16. The Respondent opposed the petition and in doing so averred that the minor sat for her Kenya Certificate of Primary Education (KCPE) exams in the year 2011 and was issued with Certificate No. [...] under the name of **MWM**. According to the Respondents, since the petitioner has not shown that there was an error or mistake in the certificate, the provisions of rule 20(7) of the **Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules, 2009** cannot be invoked.

17. The Respondent's position was therefore that the 2nd Respondent is constrained by the rule of law which expressly outlaws the change of names unless the amendments are to correct an error hence the basis upon which it declined to change the minor's name as depicted in the certificate.

18. In the Respondents' view, it is not the duty of the court to expand the scope of legislation or the intention of the legislature when the language of the provisions is plain and unambiguous hence this petition is misconceived and incompetent. It was therefore contended that the petition discloses no justifiable cause to warrant the intervention by this court and this petition ought to be dismissed with costs.

Determinations

19. I have considered the petition, the affidavits in support thereof and in opposition thereto and the submissions filed as well as the authorities relied upon in support thereof.

20. Article 53(1) of the Constitution provides that every child has the right to a name and nationality from birth. Article 53 of the Constitution falls within Chapter 4 of the Constitution which deals with the Bill of Rights. Article 20(3) and (4) of the Constitution provides that:

In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

21. Similarly, Article 259(1) of the Constitution 2010 provides that the Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

22. In my view the right to have a name necessarily implies the right to change that name. Therefore, where a person lawfully changes his name, it is only right that the person ought to enjoy the benefits that accrue to him as a result of that change. To deny a person the benefits that accrue to him as a result of the change of his name, in my view, amounts to the denial of the right under Article 53 of the Constitution. This court is constitutionally obliged to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

23. In this case, the Respondents have not advanced any hindrance to the reflection of the minor's current names in her certificates save on the ground that the law does not permit the 2nd Respondent to do so. Just like **Korir, J** in **Republic vs. Kenya National Examination Council & Another ex-parte Audrey Mbugua Ithibu** (supra), it is my view that since the minor Applicant changed his name through a deed poll which is a legally recognised method, it is not the business of state agencies to select names for Kenyan citizens. Therefore, the reason advanced by the Respondents for the 2nd Respondent's failure to effectuate that decision is not a legitimate reason for denying the Applicant's request. The Respondents have not cited to me any legal provision that expressly bars the 2nd Respondent from effecting the minor's change of name. There mere fact that the provisions deal with correction of errors does not necessarily limit the enjoyment of the minor's rights guaranteed by the Constitution. A declaration that the minor is entitled to a name of her choice and that the 2nd Respondent is obligated to effect the changes in the names appearing in the minor's Kenya Certificate of Primary Education Certificate No. [...] from **MWM** to **MWM**.

24. In the premises I find merit in this petition and I issue the following orders:

A. An order bringing into this Court for the purposes of being quashed and quashing the decision by the 2nd Respondent not to effect the changes in the records of the 2nd Respondent pursuant to the said deed poll.

B. An order compelling the 2nd Respondent to amend its records to reflect the minor's change of name from MWM to MWM and to recall the minor's current Kenya Certificate of Primary Education certificate and to issue her with a new certificate in the names of bearing the names MWM, upon payment of the prescribed fees.

C. As no basis was laid for an award of compensation and/or exemplary damage as against the 2nd Respondent there will be no such award.

D. The Costs of this petition are awarded to the Petitioner.

25. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey